No. 82-1485

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IN THE

Supreme Court of the United States

October Term, 1982

CHARLES REED

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where the District Court *sua sponte* granted a continuance of a case, giving at the time boilerplate reasons to justify its actions, was a later denial of Petitioner's Pre-Trial Motion to Dismiss under the Speedy Trial Act a violation of the Tenets of that Act and the Sixth Amendment right to a speedy trial?

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No.

IN THE

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OCTOBER TERM, 1982

CHARLES REED,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Charles Reed, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 30, 1982.

OPINIONS BELOW

On December 30, 1982 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A-A affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania. On February 9, 1982, Judge Bechtle had filed an Order denying Petitioner's Pre-Trial Motion to Dismiss for alleged violation of the Speedy Trial Act and made findings of fact and conclusion of law in a Memorandum Order, which has not been officially reported, but which is reproduced in Appendix C, *infra*, pages A-A. On January 24, 1983 the Third Circuit denied a Petition for Rehearing in Banc which has not been officially reported but is reproduced in Appendix B, *infra*, pages A-A.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra* pages A-A) affirming the judgment of the District Court, was entered on November 15, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The United States Constitution provides in pertinent part:

AMENDMENT VI - PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Speedy Trial Act provides in pertinent part:
18 U.S.C. §3161 TIME LIMITS AND EXCLUSIONS

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment which the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

(h) (8) (a)

The following periods of delay shall be excluded in computing the time within which an information of an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel for at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

STATEMENT OF THE CASE

The Petitioner Charles Reed was indicted as part of a five count indictment returned against nine persons in the Eastern District of Pennsylvania on August 5, 1981. The Petitioner was charged in the first count only, charging conspiracy to distribute methamphetamine in violation of 21 U.S.C. §846.

Prior to trial, guilty pleas were entered by co-Defendants Richard Jones, Leroy Scott, and Raymond McGowan (charged only with conspiracy). Judy Simpson and Lucy Simpson, who were also charged with conspiracy in count one, had their charges dropped by the Government prior to trial.

On August 10, 1981, the Petitioner appeared for his arraignment and entered a plea of not guilty to the one count in which he had been charged. Bond was set in the sum of Ten Thousand Dollars at ten percent, and the Petitioner was released.

On September 8, 1981, trial consel for the Petitioner, Burton A. Rose, Esquire, entered his appearance for the Petitioner. At the same time counsel filed a motion to extend the time for the filing of pre-trial motions.

In that Motion, counsel advised the Court that since the discovery process was not completed as of that time, an extension for reasonable time was sought in order to determine, as a result of that discovery, whether or not any pre-trial motions would be warranted in the case.

Before that Motion could be decided, Judge Bechtle entered on Order on September 10, 1981, directing that excludable time in the above-captioned case would be computed and entered on the record from the date of the filing of the Defendant's motion to extend time for filing pre-trial motions, September 8, 1981, until such time as the motion was disposed of. Such an Order was appropriate pursuant to 18 U.S.C. §3161 (h) (1) (F).

On September 29, 1981, the District Court, acting in response to the Motion of the Petitioner filed on September 8, 1981, entered an Order, granting an additional period of time until October 15, 1981 for the purpose of submitting any pre-trial motions which may develop because of discovery with the United States Government.

On October 1, 1981, the District Court entered another Order, a copy of which is attached hereto in Appendix D, in which it was held that the above action could not proceed to trial and would be continued, and in support thereof checked off certain blocks on a pre-typed form as appeared in the Order. The Order held that the failure to grant a continuance would make a continuation of the proceedings impossible or result in a miscarriage of justice, and that the case taken as a whole was so unusual and complex that it was unreasonable to expect adequate preparation within the periods of time established. The Court concluded that "the ends of justice" served by granting the continuance outweighed the interest of the Defendant and the public in a speedy-trial, and therefore ordered the case continued.

On October 13, 1981, counsel for the Petitioner forwarded a letter to the District Court. That letter advised the Court that no pre-trial motions would be filed on behalf of the Petitioner, but that in the event that subsequent discovery indicated grounds for such motions, defense counsel reserved the right to file such motions at that time.

Subsequent to these events, the case proceeded in a limbo status until January 15, 1982, when the Court sent notice to the various Defendants that a hearing would be held concerning a "possible date for trial and the retention on counsel by the Defendants". At that time, only two (2) of the various Defendants, Leroy Scott and the Petitioner, had retained counsel. This left six (6) Defendants who had been indicted on August 5, 1981 and who had not been called upon to appear in Court with counsel as of January 15, 1982. The hearing for that purpose was scheduled before Judge Bechtle on February 2, 1982.

Prior to that hearing, cousel for Petitioner filed an Application for Dismissal under the Speedy Trial Act with the District Court.

This motion was denied by the District Court by virtue of a Memorandum Order dated February 9, 1982; a copy of which is attached hereto and marked Exhibit "B".

On February 5, 1982, the District Court sent out a notice scheduling the matter for trial on February 16, 1982.

The pre-trial motion referred to above alleged that the seventy-day period permitted by the Speedy Trial Act for a trial subsequent to the post-indictment arraignment would have expired on October 24, 1981. Petitioner concedes that the filing of the pre-trial Motion on September 8, 1981, (seeking additional time to file Pre-trial Motions) caused a period of excludable time which is added to the date aforementioned. Since the District Court disposed of the Pre-trial Motion on October 15, 1981, a period of thirty seven days would be added on so that the trial should have occurred no later than December 1, 1981.

The case proceeded to trial before a jury and the Petitioner was found guilty as to count one on February 25, 1982.

On April 13, 1982, Judge Bechtle sentenced the Petitioner to a term of three years in the custody of the Attorney General. The Petitioner took a timely Appeal to the Third Circuit. That Court affirmed the District Court on December 30, 1982. A Petition for Rehearing In Banc was denied on January 24, 1983.

REASONS FOR GRANTING THE WRIT

I. The District's Court's denial of Petitioner's Pre-Trial Motion Seeking Dismissal Under the Speedy Trial Act 18 U.S.C. 3161 et seq. violated the tenets of that Act and the Sixth Amendment to the United States Constitution.

As has been indicated above, the trial commenced well beyond the seventy day period allowed under the Speedy Trial Act, 18 U.S.C. §3161(c). The failure to dismiss this indictment and the upholding of the decision by the Third Circuit Court of Appeals has raised a novel new issue on a federal question regarding a procedure which has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The District Court's Order of October 1, 1981 granted a general continuance to serve "the ends of justice" occurred *sua sponte*, without application from either party. The Appellant contended in the Motion to Dismiss that the aforesaid Order was not sufficiently based upon any Findings of Fact appropriate to the case and was unsupported by the record. Additionally, the Petitioner contended that the reasons supplied in that Order were not based upon the circumstances of this particular case, but rather represented general conclusions unwarranted by the circumstances of this litigation. It was noted that no evidentiary hearing or Fact-Finding activity was undertaken by the District Court prior to the entry of the Order of October 1, 1981.

In the argument to the District Court concerning the Motion to Dismiss, the Petitioner cited *United States v. Carrasquillo*, 667 F.2d 382 (3rd Cir. 1981). Appellant argued that the granting of such a continuance under this case must be based upon reasons and findings which clearly establish that the ends of justice allegedly served by the granting of the continuance do in fact outweigh the interest of the Defendant and the public in a Speedy Trial and that such reasons and findings must be made prior to the expiration of the time frame for trial.

Furthermore, the Motion to Dismiss objected to the District Court's use of form language tracking the phrases supplied in the Act in order to justify the continuance. The Petitioner averred in the Motion to Dismiss that there were no reasons to justify the District Court's conclusion that the failure to grant a continuance would make a continuation of the proceedings impossible or result in a miscarriage of justice, or that the case was so unusual or complex that it was unreasonable to expect adequate preparation within the period of time allowed until November 15, 1981.

In *United States v. Carrasquillo, supra,* the Third Circuit stated that "any delay must be justified on the record and only under carefully limited circumstances" and favorably noted the language from the United States Senate Hearings to the effect that the only delays which are permitted are those which are "absolutely necessary to secure a fair trial".

The Petitioner argued before Judge Bechtle that the Order of October 1, 1981 should be set aside and the case dismissed with prejudice, with reprosecution prohibited since the same would have an adverse and negative impact on both the administration of the Act and the administration of justice, since such extensive delays on an insufficient basis should not be tolerated.

In denying this Motion, the District Court stated that this case "is a very complex drug conspiracy involving nine defendants." It must be noted that at the time of that Order, the case had not yet gone to trial and the District Court made this conclusion soley on the basis of the Indictment, as that was the only matter of evidence that the Court had before it that moment. The Court further noted that many of the Defendants were unrepresented; however, this Appellant was represented prior to the time that the Distict Court entered its Order on October 1, 1981 continuing the case because of this alleged complexity. The Appellant submits that his Speedy Trial claim should not be rejected

merely because the co-defendants had not been called upon by the Court to appear and provide reasons why they were not yet represented; the District Court did not take this action until February 2, 1982.

The District Court went on to state that becaue the request for an extension of time to file Pre-trial Motions "was unreasonable", the Court entered the Order of October 1, 1981 granting "an ends of justice" continuance. The Court went on to misconstrue the letter of defense counsel dated October 13, 1981 as a request to postpone the time for filing of Pre-trial Motions for an indefinite period. As is indicated by a fair review of that letter, the only purpose thereof was to notify the District Court that an opportunity had not yet been provided to listen to the various tape recordings in the case since the Government wished to make a single presentation to all counsel of those tapes, and other defendants had not yet retained their attorneys. It cannot be fairly said that the letter constitutes an argument that the case was too complex to prepare for trial before November 15, 1981. The fact that *no* Pre-trial Motions were in fact filed -- is certainly not evidence of the complexity of the case and indeed shows the lack of complexity.

At no time did counsel for Petitioner request that the District Court delay the trial date or take any other action with regard to the scheduling of the trial based upon the complexity of the case.

The Petitioner disagrees with the conclusion of the Court that the time required to prepare the case was "totally within the control of the Defendant and his counsel and counsel for the Government". Although the issue of discovery was certainly a matter of counsel to resolve, the Petitioner contends that it was the responsibility of the District Court to take stock of the Speedy Trial Act's limitations and assure itself that the scheduling of the case

for trial would be consistent with those restrictions. *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 375-76 (2d Cir. 1979). The Order of October 1, 1981, was entered at a time when the District Court had no basis -- and made no factual findings in support thereof -- to conclude that the case was so complex that trial could not be had within the time then remaining.

As stated in *United States v. Molt*, 631 F.2d 258 (3rd Cir. 1980) the intent of Congress in requiring reasons to be stated in the record by the Court in granting an "ends of justice" continuance is to allow for proper Appellate review. In this case, unlike *Molt* an appellate court cannon determine whether or not Judge Bechtle was correct since his Order of October 1, 1981 merely tracked the form language of the Act and involved merely checking blocks on a form while providing no findings or reasons in support thereof. Of the two "boilerplate" reasons for allowing an "end of justice" continuance the first included the general statement: "[t]he failure to grant such a continuance . . . would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." This language leads to highly subjective reasoning based on extremely broad guidelines which supplies an appellate court with little or no indication of the factual basis which prompted the District Judge to grant the continuance.

The second reason checked state that: "[t]he case taken as a whole is so unusual and so complex; due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established." Although this reason is more helpful to a reviewing court than the first, this second reason is a compound factual statement not all of which may be relevant to the District Court's decision and, as such, was insufficient to provide clear enough explication of the District Court's reasoning to enable an appellate court to properly review the decision to grant a continuance.

The Memorandum Order of February 9, 1982, denying the Motion for a Speedy Trial Act dismissal does not comply with the requirements for finding and reasons as contained in *Carrasquillo* and *Molt, supra,* or under 18 U.S.C §3161(h) (8) (A).

In *United States v. Nance,* 666 F.2d 353 (9th Cir. 1982), it was stated that granting an "ends of justice" continuance is a tactic which the District Courts should "rarely use". This conclusion was based upon an analysis of the legislative history involved. The Ninth Circuit went on to say that the "interest of justice exception should not be invoked without findings to support it", 666 F.2d at 356.

The Ninth Circuit further stated that a trial Judge has a responsibility to protect the Speedy Trial rights of the accused and therefore "must keep track" of the time limits contained in the Act in scheduling the various cases before it for trials.

In *United States v. Fielding.* 645 F.2d 719 (9th Cir. 1981), that same court stated that a trial Judge is required to make factual findings in considering the factors involved in a continuance under the Act and must "explicitly set forth his reasons for finding that the ends of justice served by the continuance outweigh other interests protected by the Act." 645 F.2d at 722.

The Appellant respectfully submits that in this case the District Judge failed to comply with these standards and failed to conduct the "searching inquiry", *United States v. Fielding, supra,* required by the Act before "an ends of justice" continuance can be granted. An examination of the record of this case indicates that at the time the continuance was made, the District Court had before it only the indictment and the material supplied by defense counsel, which could not serve as a sufficient basis to conclude that the case was so complex that could not be tried within the time frame supplied by the Act. Even if one looks to subsequent facts, the case was not possessed of any unusual

complexity. Only four (4) of the nine (9) Defendants actually went to trial, at which time the Government only called seven (7) witnesses, two (2) of whom were chemists. The case was over in a period of five (5) days. As to the Appellant Charles Reed, the only witness who testified as to his alleged criminal activities in this case was one Robert Barron. Additionally, it should be noted that when the four Court-appointed Attorneys appeared in Court on February 2, 1982, having just received their appointments, they objected to the trial date of February 16, 1982, but such protests were refused and continuances were denied. At that point apparently, the District Court did not believe that the case was so complex that trial could not be held within a two (2) week period even though trial counsel for many of the Defendants had just been assigned to the litigation.

In the Third Circuit's opinion it stated that the Act does not require a contemporaneous recording of reasons for the District Court's *sua sponte* granting of a continuance. Slip Op. at 10. The Court stated its agreement with the District of Columbia and Eighth Circuits. *United States v. Edwards,* 627 F.2d 460, 461 (D.C.Cir.), *cert. denied,* 449 U.S. 872 (1980); *United States v. Clifford,* 664 F.2d 1090, 1095 (8th Cir. 1981). However, Judge Bechtle did not give any substantial reasons till February 9, 1982, a period of time 191 days after the arraignment and well beyond the seventy day period of §3161(h) (8) (A). *Carrasquillo* stands for the proposition continuances are not to be granted *nunc pro tunc.* See also *United States v. La Cruz,* 441 F. Supp. 1261, 1264-65 (S.D. N.Y. 1977).

In the instant case, the District Court did not comply with the requirement of placing reasons for granting the continuance on the record and even if this was done the reasons were factually insufficient to justify the continuance that was granted. However, the Third Circuit affirmed this opinion. This Court must invoke its supervisory powers to delineate the accepted and ususal course of proceedings of the relevant portions of the Speedy Trial Act presented herein.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

Mark D. Schaffer
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 82-1265 and 82-1270

UNITED STATES OF AMERICA

v.

ALPHONSO BROOKS,
Appellant in No. 82-1265

and

UNITED STATES OF AMERICA

v

CHARLES REED, a/k/a/ Bouloud
CHARLES REED,
Appellant in No. 82-1270

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Argued October 28, 1982

Before: ADAMS and GARTH, Circuit Judges
and GERRY, District Judge*

(Filed Dec. 30, 1982)

---

* Honorable John F. Gerry, United States District Court District of New Jersey sitting by designation.

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OPINION OF THE COURT

ADAMS, Circuit Judge.

In these appeals, Alphonso Brooks and Charles Reed, the appellants, challenge their convictions for participating in a conspiracy to manufacture and distribute controlled substances. They raise two primary contentions: that their rights under the Speedy Trial Act, 18 U.S.C. §3161 et seq., were violated by the district court's *sua sponte* decision to grant a continuance, and that there was a fatal variance between the conspiracy charged in the indictment and that proved at trial. After considering these issues, and the appellants' other contentions, we conclude that all their claims are without merit and that the convictions should be upheld.

I

The indictment in this case charges that a number of persons engaged in a single conspiracy to manufacture and distribute methamphetamine, a non-narcotic controlled substance, in violation of 21 U.S.C. §846. One member of the group, Robert Barron, became a government witness and the other nine were indicted. Barron appears to have been the chief distributor. He received the drugs from two sources: from Reed, one of the appellants here, one from Rick Jones. Brooks, the other appellant, worked with Jones as a chemist, helping to manufacture the drugs and to obtain the needed supplies. The other defendants were distributors of the drugs; none of them has appealed.[1]

On August 5, 1981, the appellants and their seven co-defendants were indicted. The appellants were charged in the conspiracy count only. Five days after the indictment was filed, the defendants were arraigned. On September 3, counsel for Reed moved to extend the time for filing pre-trial motions. This motion was granted on September 29. On October 1, the court *sua sponte* ordered a further continuance, concluding that the "ends of justice" served by granting the continuance outweighed the interest of the defendants and the public in a speedy trial because of the complicated nature of the case and the fact that one of the defendants had not yet obtained counsel. A trial date of February 16, 1982 was eventually set.[2] Prior to trial, counsel for both Brooks and Reed moved to have the case dismissed for violation of the Speedy Trial Act. These motions were denied by the district court, and the case proceeded to trial before a jury. Both Brooks and Reed were found guilty.

---

[1]Prior to trial, guilty pleas were entered by four of the defendants, and the government dropped charges against two others.

[2]The Court's original order did not specify when the trial would begin.

Brooks and Reed each raise several challenges to his conviction. Although we have considered all of their claims, only two will be discussed in detail. They first argue that the court's *sua sponte* continuance deprived them of their rights under the Speedy Trial Act. Second, they allege that the proof adduced at trial did not establish that Reed was part of the same conspiracy as Brooks and Jones; rather, appellants claim that they were two separate and competing drug manufacturers. Inasmuch as the indictment charged a single, unified conspiracy, Brooks and Reed assert that this was a prejudicial variance which warrants setting aside their convictions.

II

Since the defendants were arraigned on August 10, 1981, if no time were excluded between that date and the date of the trial, the Speedy Trial Act would have required trial to commence no later than October 19, 1981 - seventy days from the date of the arraignment. **See** 18 U.S.C. §3161(c). On October 1, 1981, the district court granted the continuance that is at issue here, and the trial did not begin until February 16, 1982 – 190 days after the defendants' first appearance in court. Brooks and Reed argue that the delay time caused by the continuance is not excludible under the Act, because the district court did not properly set forth its reasons for granting the continuance. Even if the court's statements explaining the delay do satisfy the statute's procedural requirements, the appellants further contend that the reasons set forth by the trial court are substantively insufficient to justify a continuance. If they are correct, the statute would make it necessary to dismiss the indictment against them. We reject both of their arguements, however, and hold that the delay caused by the continuance is properly excluded under the Act, and that the reasons given by the district court are sufficient.

Congress enacted the Speedy Trial Act to "give effect to the Sixth Amendment right to a speedy trial" by setting specified time limits after arraignment or indictment within which criminal trials must be commenced.[3] H.R. Rep. No. 1508, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code, Cong., & Ad. News 7401, 7402. A defendant must be brought to trial within seventy days following his indictment or first appearance before the court whichever occurs later. 18 U.S.C. §3161(c).[4] If this deadline is not met, the Act requires the district court to dismiss the indictment, either with or without prejudice. 18 U.S.C. §3162(a) (2). Certain periods of delay are excluded from the calculation of the seventy-day time limit, including "[a]ny period of delay resulting from a continuance . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. §3161(h) (8) (A). The Act provides that the district court may grant such a continuance *sua sponte*. *Id.*

The district court is required to set out its reasons for granting an "ends of justice" continuance on the record, either orally or in writing. 18 U.S.C. §3161(h)(8)(A). If this is not done, the time is not excludible. *See United States v. Carrasquillo*, 667 F.2d 382, 385-88 (3d Cir. 1981); *United States V. New Buffalo Amusement Corp.*, 600 F.2d 368, 375 (2d Cir. 1979). The Act lists some of the factors the court is mandated to consider when deciding whether such a continuance should be granted:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

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[3]The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. Const. Amend. VI. The protections of the Act go beyond those secured by the amendment, since the Constitution does not require that a trial commence within a specified time. *See Barker v. Wingo*, 407 U.S. 514 (1972).

[4]During the first year the Act was in effect, the period within which the defendant had to be brought to trial was 180 days. During the second year it was 120 days, and in the third year, eighty days. 18 U.S.C. §3161(g). The Act originally provided that, after this three-year phase-in period, trials had to commence within sixty days. This section was amended in 1979 to establish the current seventy day time limit.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

18 U.S.C. §3161(h) (8) (B).

Two purposes are served by the requirement that district courts must set forth their reasons for granting an "ends of justice" continuance. First, Congress wanted to insure that a district judge would give careful consideration when balancing the need for delay against "the interest or the defendant and of society in achieving speedy trial." S. Rep. No. 1021, 93d Cong., 2d Sess. 39 (1974). Second, the requirement provides a record so that an appellate court may review the decision. *United States v. Molt*, 631 F.2d 258, 262 (3d Cir. 1980). If a district court's statements do not comport with these two purposes, they are not sufficient to satisfy the statutory command that "reasons" be set forth "in the record of the case." 18 U.S.C. §3161(h) (8) (A). Without properly explained reasons, the delay caused by a continuance is not an excludible item.

A form has been adopted by the Eastern District of Pennsylvania which judges may use to record their reasons for granting continuances; the judge may place a check mark on the form next to one or more of three reasons justifying the decision. The form lists two statements which track the language of Sections 3161(h) (8) (i) and (ii), and contains a third line, marked "other," which provides space for the judge to write in some alternative basis for granting the continuance. In the proceeding at issue here, the district court checked both of the the pre-typed reasons and added no additional comments to the form.

The first reason printed on the form is "[t]he failure to grant such a continuance . . . would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." This is one of the factors Congress insists that the court consider. It is,however, a highly subjective and extremely broad guideline. It supplies the appellate court with little or no indication of the factual basis which prompted the district judge to grant the continuance.[5]

A second reason is provided by the form: that "[t]he case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution and other complexity, that is unreasonable to expect adquate preparation within the periods of time established." This provision is more helpful to a reviewing court than the first reason, since it does give some indication of the problems raised by the actual situation presented. Because the statement combines several factual concerns, however, not all of which may be relevant to the district court's decision in any given case, it still may not be sufficient, by itself, to provide clear enough explication of the district court's reasoning to enable an appellate court properly to review the decision to grant a continuance. For the reason set forth below, we need not reach the difficult question whether this statement alone is a sufficiently articulated "reason" to satisfy the statute.

In the present case, the form, when read together with the later statement made by the district court explaining in greater detail its reasons for granting the continuance, satisfies the requirements of the Act. Four months after the continuance was issued, the appellants each moved to have the indictment dismissed, alleging that the court had failed to comply with the provisions of the Speedy Trial Act. In a memorandum order dated February 9, 1982, the district

[5]We need not reach the issue whether such a statement standing alone would suffice because, in our case, more appears.

[6]To the extent that appellants base their claims on the Eastern District of Pennsylvania's 1980 "Plan For Prompt Disposition of Criminal Cases," we direct attention to Section II(10)(a) of the Plan which states: "Nothing in this plan shall be construed to require that a case be dismissed or a defendant released from custody in circumstances in which such action would not be required by 18 U.S.C. §3162 and 3164." (footnote omitted). It appears that the appellants did not raise the issue of the Eastern District Plan before the trial court.

court explained in great detail the basis for its initial decision. It emphasized that this was a complex case which alleged a drug manufacturing and distribution conspiracy involving nine people at varios levels of production, and four substantive counts of possession and distribution at different times involving varios members of the conspiracy. The court also noted that, at arraignment, not all defendants had yet secured counsel. In addition, it appeared that discovery had not been completed by the time the continuance was granted.

The memorandum opinion by the district court was not issued until after the seventy-day period for trial would have run, if the period of the continuance was not considered excludible time. Appellants contend that the district court cannot, after the seventy days has passed, justify previous periods of delay and thereby extend the Speedy Trial Act deadline. For this proposition, they rely on our opinion in *United States v.Carrasquillo*,667 F.2d 382 (3d Cir. 1981). This reliance is misplaced. In *Carrasquillo*, the deputy court clerk, in attempting to accommodate the schedule of the defense attorney, delayed setting a trial date for the case. When the seventy day period had expired, the defense attorney filed a motion to dismiss for failure to comply with the Speedy Trial Act. It appears that it was at this point that the district judge first became aware of lapsed time. The court then granted a retroactive "ends of justice" continuance for the period during which the defense attorney's other court appearances had made his unavailable for the trial Carrasquillo. This Court held that a judge could not grant an "ends of justice" continuance *nunc pro tunc*, providing after the fact justification for unauthorized delays. Rather, we declared, the district judge must consider the matter at the outset and determine whether the "ends of justice" require that the trial be postponed.

Although the district court must decide initially whether to grant a continuance, we did not, in *Carrasquillo,* require that the reasons for the decision be entered on the record at the same time that the decision is made. The language of the statute does not specify when the court's findings must be recorded, and the purposes of the statute are satisfied by a subsequent articulation. The judge's later statements explaining his decision serve both to create a record for reveiw and to demonstrate that he has given the matter the careful consideration which the Act requires. We therefore agree with our colleagues on the District of Columbia and Eighth Circuits that the Act does not require a contemporaneous recording of reasons. *United States v. Clifford,* 664 F.2d 1090, 1095 (8th Cir. 1981); *United States v. Edwards,* 627 F.2d 460, 461 (D.C. Cir.) *cert. denied,* 949 U.S. 872 (1980). Thus, in this case, we hold that the judge's memorandum opinion and his adoption of the two statements on the form, when taken together, are sufficient to satisfy the "reasons" requirement of the Speedy Trial Act.

Appellants argue that the trial court's actions, even if they comply with the "reasons" requirement, are factually insufficient to justify the continuance that was granted. The district court determined that the case was too complex to go to trial within seventy days, and that additional time was also necessary because not all defendants had yet retained counsel. Our inquiry is limited to the question whether the district court abused its discretion in granting this continuance. *See United States v. Faison,* 679 F.2d 292 (3d Cir. 1982); *United States v. Aviles,* 623 F.2d 1192 (7th Cir. 1980). The district court relied on the following facts in making its determination: the indictment charged nine individuals with engaging in a three-year drug conspiracy spanning virtually all levels of production and distribution; the indictment detailed four separate substantive charges of possession and distribution of controlled substances by some members of the conspiracy; some defendants had not yet been able to retain counsel, and one attorney who had been retained had felt the need to move for an extension of time within which to file pre-trial motions. On the basis of this information, we cannot say that the judge abused his

discretion in holding that the case was complex and required additional time for adequate preparation. Accordingly, we hold that the entire period of time covered by the October 1, 1981 "end of justice" continuance was properly carved out from the calculation of the seventy days within which the Act requires the defendants to be brought to trial, and thus there was no violation of their Speedy Trial rights.[6]

III

Brooks and Reed also argue that there was a prejudicial variance between the indictment and the proof that was advanced at trial. The indictment charged a single conspiracy, but the appellants claim that the evidence established that at least two conspiracies existed, one involving Jones and Brooks,[7] and another involving Reed. Appellants point to various statements in the record to support their claim, but their position appears to be based on the assertion that Jones and Reed were, at the time charged in the indictment, competitors rather than partners in the methamphetamine manufacturing business. Consequently, Brooks and Reed insist, they shared no common design or goal and therefore this cannot be viewed as a single conspiracy.[8] *United States v. Varelli*, 407 F.2d 735 (7th Cir. 1969); *United States v. Boyd*, 595 F.2d 120 (3rd Cir. 1978); *United States v. Lester*, 282 F.26 750 (3d Cir. 1960) (quoting *Lefco v. United States*, 74 F.2d 66 68 (3d Cir. 1934)). After reviewing the record, we conclude that there was sufficient evidence from which the jury could have found beyond a reasonable doubt that a single conspiracy existed.

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[7]Brooks also asserts that there was insufficient evidence connecting him to the conspiracy as Rick Jones' chemist. Our review of the record convinces us that such a claim is meritless. Raymond McGowan, a government witness, testified that he met twice with Brooks and Jones to discuss the purchase of chemicals necessary to make methamphetamine. At the conclusion of the second meeting, the three went to a nearby parking lot to conclude their sale. Jones rode with Brooks, and McGowan followed in his car. McGowan placed seven gallons of methylamine, a chemical used to make methamphetamine, in the trunk of the car Brooks drove and Jones then paid McGowan $1,000. McGowan also testified that he dialed the same telephone number to reach either Brooks or Jones. The number belonged to two women indicted as drug distributors. Also, according to a recorded conversation that Brooks twice referred to "Rick." Later in the discussion, Brooks mentioned that he and an unnamed partner had had prior dealings with McGowan. The jury could reasonably have concluded, based on McGowan's prior testimony, that Jones was the unnamed partner.

A variance would occur if the evidence at trial proves the existence only of multiple conspiracies when the indictment has charged a single conspiracy. If the variance has affected substantial rights of the accused, it is prejudicial and the conviction must be reversed. *Kotteakos v. United States*, 328 U.S. 750 (1946). Since the issue of how many conspiracies the evidence proves is a question of fact to be decided by jury, a federal appellate court "must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision . . . [I]t is apparent that [a reversal] will be confined to cases where the prosecution's failure is clear." *Burke v. United States*, 437 U.S. 1, 17 (1978) (citation and footnote omitted). *See United States v. Boyd*, 595 F.2d 120, 123 (3d Cir. 1978).

The key witness connecting Reed with Jones and Brooks was Barron, the distributor who had become a government witness. He testified that Reed and Jones had, prior to the conspiracy, been partners in distributing heroin. This statement is undisputed. There is some conflicting testimony whether that relationship was severed prior to the beginning of the conspiracy. Barron purchased methamphetamine from both Reed and Jones several times during the period covered by the indictment, although he never saw the two manufacturers together. Barron also testified that he often purchased the drugs at a small tore in Philadelphia that he believed was operated jointly by Jones and Reed, and it appears from his testimony that he bought methamphetamine from both of them at that location. He discussed the dealings he had with each of them with the other many times. Also, on at least one occasion, Barron went to Jones to purchase drugs and Jones sent him to Reed instead. Finally, Barron testified that during one drug sale (involving an undercover DEA agent) at which Jones was present, another co-conspirator mentioned both Brooks and Reed as possible sources for chemicals they needed to manufacture methamphetamine.

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*Because we determine that the evidence is sufficient to suppprt a finding that Reed and Jones acted together, we need not address appellants' questionable proposition that competitors cannot be co-conspirators. We note in passing, however, that the antitrust laws assume that such conspiracies can occur. *See e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*,273 U.S. 392 (1927); *United States v. Joint Traffic Assoc.*, 171 U.S. 505 (1898).

While this evidence does not establish that Jones and Reed were actually partners, it is sufficient to sustain a finding that they were, in essence, "joint venturers." Each operated his own laboratory, but they shared a distribution network. Their "common goal" was to facilitate the sale of the entire supply of methamphetamine. This is not the same as two thieves who happen to use the same "fence," and arrangement which in *Kotteakos* was determined not to be a single conspiracy. In the "fence" situation, neither thief may be affected by the existence of the other, whereas it appears that the drug dealers here actually worked to assist each other's business.

In *United States v. Kenny*, 462 F.2d 1205 (3d Cir.) *cert. denied*, 409 U.S. 914 (1972), we upheld a single conspiracy conviction of both city and county employees charged with receiving kickbacks, even though each group actually extorted money only from contractors dealing with its political subdivision. The Court found that all the defendants nevertheless shared a common goal. It said, "The pattern of conduct reflected in the evidence is that of a determined group of repeatedly cooperated closely to achieve the common purpose of self-enrichment by extracting kickbacks." 462 F.2d at 1217. Although the crime is different in the present case, the motivation of the defendants was the same.

It is possible to read the evidence to suggest that the appellants acted independently, as they now contend. Our role, however, is not to say how we would have construed the testimony had we been the factfinder. Instead, we must ascertain whether, in the light most favorable to the government, there is substantial evidence in the record to support the jury's finding that a single conspiracy existed. We conclude that there is.

IV

Appellants mount a series of additional attacks on their convictions. Brooks claims error in the district court's refusal to grant a continuance and in the jury instruction concerning multiple conspiracies. Reed challenges the district court's denial of his requests for a severance and the jury instruction on accomplice testimony. After giving careful consideration to each of these claims, we conclude that they are without merit.
that they are without merit. Accordingly, the convictions of Brooks and Reed will be affirmed.

TO THE CLERK:

Kindly file the foregoing opinion.

Circuit Judge

Dated:

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1270

UNITED STATES OF AMERICA

v.

CHARLES REED, etc.,

Appellant

Sur Petition For Rehearing In Banc

Present: SEITZ, **Chief Judge,** ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, **Circuit Judges,** and GERRY, **District Judge.***

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all other available circuit judges in the circuit in regular actie service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: Jan 24 1983

* As to panel rehearing only.

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-00230-06
UNITED STATES OF AMERICA
v.
CHARLES REED, a/k/a Bouloud

MEMORANDUM ORDER

BECHTLE, J. FEBRUARY 9th, 1982

Presently before the Court is a motion of defendant Charles Reed in the within criminal action seeking to have this indictment dismissed on the ground that it violates the Speedy Trial Act, 18 U.S.C. §3161, because the case was not called for trial on or before October 19, 1981 (or November 15, 1981, if one excludes 21 days from the time to be computated because of the Court's Order of September 10, 1981), which would be a measure of 70 days from the time when this defendant was arraigned on August 10, 1981.

The case is a very complex drug conspiracy involving nine defendants. All of the defendants were arraigned at or about the same time. A review of the docket discloses that some of the defendants at the time of arraignment had private counsel, some had the same private counsel, some had no counsel and were directed to get counsel, and others announced that they would be securing their own private counsel.

This defendant appeared by one attorney at the arraignment.

Approximately one month later on September 8, 1981, this defendant secured present counsel who, at the time of filing his appearance, also filed a motion before the Court seeking a continuance of the time within which to complete pretrial discovery and file motions. The Court determined that the motion for continuance was reasonable due to the complex nature of the case, because many of the defendants had not yet secured counsel with whom present counsel could collaborate in respect to pretrial discovery, and

*1 This Order was filed prior to the expiration of the seventy day period.

because the principal part of the Government's case consisted of telephone wiretap recordings, videotape recordings, and body tape recordings, all of which could consume between six and seven hours of listening time and in respect to which this attorney had hoped, as did the Government, could have been concluded at one sitting with all defendants and all counsel present.

Because the request was reasonable and because of the complex nature of the case, the Court, on October 1, 1981, filed its Order*1, signed by the Judge, providing in pertinent summary that a continuance of the trial date was justified in order to prevent a miscarriage of justice because the case was an unusual and complex case due to the number of defendants and that the time for preparation was inadequate under all the circumstances. The Court allowed this defendant until October 15, 1981, to file a pretrial motion and complete discovery, but that proved impossible to this defendant and on October 13, 1981, two days before the deadline, the defendant filed its letter setting forth a variety of reasons why the time within which to complete the pretrial discovery of the tapes and the consideration for the filing of pretrial motions had to be postponed for an indefinite period. *See* counsel's letter of October 13, 1981, which has been docketed. Counsel's assessment of the situation at that date is best characterized by a sentence in his letter that states: "The delay has been caused by the desire of the Government to have just one pretrial screening of these tapes by all counsel. I can undertand that this is a reasonable tactic in view of the many hours of recordings that are involved." The Court agreed, but inasmuch as it had entered its Order on October 1, 1981, postponing the trial to an uncertain date, the Court took no further action but relied on the representation of this counsel that he intended, with some degree of vigor, to pursue pretrial discovery in the expectation that pretrial motions could be more sensibly and fairly prepared and filed. The fact of the matter is, as is evidenced by the record before the Court on February 2, 1982, that this counsel did nothing further -- filed no discovery motions having to do with the tapes or any other matter -- filed no motions of any kind other than the motion to dismiss presently before the Court.

Counsel for this defendant relies heavily on the case of *United States of America v. Mildred Carrasquillo*, decided

by the Third Circuit Court of Appeals on December 17, 1981, for the relief presently requested. The Court believes that is clearly distinguishable because the principal turning point of that case was that the district court had done nothing in the time within which the trial was to commence for that defendant, but presumably had delegated and relied totally upon the deputy clerk in negotiating with defense counsel for a time when trial could commence. The Court emphasized that continuances and exclusions of time under the Speedy Trial Act were intended by Congress to be determined and decided by judges of the Court and not the clerks of the Court. In the present case the Court did act well before the expiration of the time and it acted at the instance of this attorney. The fact that the postponement was indefinite was plain from its Order and by reason of the position of this defendant, it is clear that the time this defendant would need was entirely up to matters totally within the control of the defendant and his counsel Court and not the clerks of the Court. In the present case the Court did act well before the expiration of the time and it acted at the instance of this attorney. The fact that the postponement was indefinite was plain from its Order and by reason of the position of this defendant, it is clear that the time this defendant would need was entirely up to matters totally within the control of the defendant and his counsel and counsel for the Government, which the Court believed, and counsel led the Court to believe, was being arranged and managed by counsel in order to accommodate the uncertainties brought about by the number of defendants and the number of counsel, as well as the complex nature and extent of the taped material.

For all of the foregoing reasons, the Court believes that the continuance of the trial at the behest of this defendant cannot now be laid at the doorstep of the Court as a basis to dismiss the case under the Speedy Trial Act. Thus, the motion of defendant Charles Reed to dismiss the indictment is hereby *denied.*

SO ORDERED.

LOUIS C. BECHTLE, J.

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

VS.

RICHARD JONES, et al

Criminal No. 80-00230-01 02 03 04 05 06 07 08 09

Order

AND NOW, this day of October , 1981 , the Court finds that the above action cannot proceed to trial and disposition and must be continued because of the following reason:

- The failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

- The case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established.

- Other:

WHEREFORE, in accordance with 18 U.S.C. §3161(h) (8), the Court finds that the ends of justice served by granting this continuance outweight the best interests of the public and the defendant in a speedy trial and, therefore, orders this case continued.

BY THE COURT:

JUDGE

SPEEDY TRIAL ACT DELAY CODE (T)